Filed 11/9/16 P. v. Arterberry CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CAMERON ARTERBERRY et al.,

Defendants and Appellants.

F068388

(Super. Ct. Nos. BF147679A, BF147679B & BF147679C)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Cameron Arterberry.

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant Rashawn Armstrong.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant Donte Jones.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Cameron Arterberry, Rashawn Armstrong, and Donte Jones were jointly charged with eight counts of second degree robbery (Pen. Code, § 212.5, subd. (c)[1] [counts 1, 2, 4-7, 11, & 12]), one count of possession of a loaded firearm in public by a gang participant (§ 25850, subd. (c)(3) [count 3]), and one count of gang participation (§ 186.22, subd. (a) [count 13]). Arterberry and Armstrong were jointly charged with an additional count of second degree robbery (§ 212.5, subd. (c) [count 8]). Armstrong was separately charged with two additional counts of second degree robbery (*ibid.* [counts 9 & 10]).

The information also specially alleged:

In connection with counts 1, 2, 4 through 7, 11, and 12, Arterberry, Armstrong, and Jones committed the underlying offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)) and a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)).[2]

In connection with counts 1, 2, 4 through 7, 11, and 12, Arterberry and Armstrong personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)).

In connection with count 8, Arterberry and Armstrong committed the underlying offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)) and personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)).

In connection with counts 9 and 10, Armstrong committed the underlying offenses for the benefit of, at the direction of, or in association with a criminal street gang

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[1] Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

[2] A violation of section 186.22, subdivision (b), is a prerequisite for vicarious liability under section 12022.53, subdivision (e)(1). (See § 12022.53, subd. (e)(1)(A).)

(§ 186.22, subd. (b)(1)) and personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)).

In connection with counts 1 through 7, and 11 through 13, Jones was previously convicted of a "strike" offense (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and a serious felony (§ 667, subd. (a)) and served a prior prison term (§ 667.5, subd. (b)).

Trial commenced on September 5, 2013. Subsequently, the trial court granted Jones's motions for bifurcation of the recidivist enhancement allegations and judgment of acquittal for insufficient evidence as to count 6.

The jury convicted Arterberry on counts 1, 2, 4 through 8, 11, and 12 and found true the deadly or dangerous weapon use allegations, but it could not reach a verdict on counts 3 and 13 and the other conduct enhancement allegations. Arterberry received an aggregate sentence of 16 years eight months, comprised of (1) five years, plus one year for deadly or dangerous weapon use, on count 1; and (2) one year, plus four months for deadly or dangerous weapon use, on each remaining count.

The jury convicted Armstrong on counts 1, 2, 4 through 7, and 9 through 12 and found true the deadly or dangerous weapon use allegations, but it could not reach a verdict on counts 3, 8, and 13 and the other conduct enhancement allegations. Armstrong received an aggregate sentence of 18 years, comprised of (1) five years, plus one year for deadly or dangerous weapon use, on count 1; and (2) one year, plus four months for deadly or dangerous weapon use, on each remaining count.

The jury convicted Jones on counts 1 and 2 and acquitted him on counts 4, 5, 7, 11, and 12, but it could not reach a verdict on counts 3 and 13 and the non-bifurcated conduct enhancement allegations. The trial court found true the recidivist enhancement allegations in a bifurcated proceeding. Jones received an aggregate sentence of 15 years, comprised of five years doubled to 10 years, plus five years for the prior serious felony conviction, on count 1. The court stayed execution of punishment on count 2 pursuant to section 654.

Each defendant filed an appeal. Armstrong contends (1) the trial court erroneously admitted the confession of Arterberry, who did not testify at trial, in violation of the *Aranda-Bruton* rule[3]; (2) except for counts 1 and 2, the evidence did not support the robbery convictions; and (3) his trial attorney rendered ineffective assistance by failing to object to evidence concerning his responses to gang affiliation questions posed during the booking process.[4]

Jones contends the restitution fine imposed by the trial court pursuant to section 1202.4, subdivision (b), should be reduced from $280 to $240.[5]

Arterberry, Armstrong, and Jones jointly ask us to review the sealed transcript of the trial court's in camera hearing denying their motions to disclose the identity of a confidential informant.

We conclude (1) Arterberry's confession was not subject to the *Aranda-Bruton* rule; (2) substantial evidence supported the challenged robbery convictions; (3) Armstrong's claim of ineffective assistance of counsel must be rejected because the appellate record does not shed light on why his trial attorney did not object; (4) the restitution fines shall be reduced to $240; and (5) the trial court properly denied the disclosure motions.

STATEMENT OF FACTS

I. The string of robberies in Bakersfield.

a. *Counts 1 & 2: Carl's Jr. at 3901 Auburn Street.*

On November 24, 2012, Carl's Jr. employees Jesus Gonzalez and Isabella Polanco were near the service counter when two African-American men wearing black ski masks,

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3 *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123.

4 Arterberry and Jones join in the arguments that inure to their benefit.

5 Arterberry joins in this argument.

black and white gloves, and dark-colored clothing entered the restaurant at 9:47 p.m.[6] The first masked man wielded a firearm. He ordered Gonzalez and Polanco to "be quiet" and "put [their] hands up" and then went into the kitchen to subdue the other employees. The second masked man carried a knife and a bag. He told Gonzalez, "Give me your money" "I won't hurt you as long as you do what I say." Gonzalez unlocked the registers and the second masked man transferred the money into the bag. The perpetrators fled at 9:48 p.m.[7]

Petra and Abraham Gonzales were in the drive-through lane at Frosty King, bounded by Carl's Jr. to the west and La Mina Cantina to the east, when they first observed two men wearing black ski masks, black and white gloves, and dark-colored clothing walking in the direction of Carl's Jr.[8] Afterward, from the Starbucks parking lot across the street, the couple witnessed the masked men exiting Carl's Jr. with a bag, running eastbound on Auburn Street past La Mina Cantina, and entering the passenger side of a car whose engine was already running.[9] Petra,[10] who was in the driver's seat, followed the getaway vehicle. Abraham called 911 and gave the dispatcher the vehicle's license plate number.

Bakersfield Police Officer Bobby Woolard conducted a felony traffic stop of a "silverish-gray bluish" 1988 Lincoln Town Car whose license plate number matched the

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6 Unspecified references to dates in the statement of facts are to the year 2012.

7 The prosecution played Carl's Jr.'s surveillance footage of the robbery.

8 The prosecution played La Mina Cantina's surveillance footage of two individuals walking westbound on Auburn Street at 9:46 p.m.

9 The prosecution played La Mina Cantina's surveillance footage of two individuals running eastbound on Auburn Street at 9:48 p.m. It also played Frosty King's surveillance footage of two individuals running eastbound in the direction of La Mina Cantina.

10 To avoid confusion, we identify individuals who share the same surname by their first name. No disrespect is intended.

one he received from the dispatcher. The driver, identified as Jones, was dressed in light-colored clothing. The passengers, identified as Armstrong and Arterberry, were dressed in dark-colored clothing. An automobile search revealed several black ski masks, a pair of black and white Franklin gloves, a pair of black and white "zebra print" Dagger gloves, a brown bag containing $1,156, a large kitchen knife, and a .40 caliber semiautomatic firearm loaded with Federal ammunition.

Gonzalez, Polanco, and two other Carl's Jr. employees were transported to the scene of defendants' arrests for an in-field show-up. All four identified Armstrong as the gunman.

b. *Count 6: Carl's Jr. at 2412 Ming Avenue.*

On November 20, Carl's Jr. shift leader Daniel Vega and two coworkers were at the service counter when two men wearing black ski masks entered the restaurant some time between 8:00 and 9:30 p.m. The first masked man, an African-American, wore a gray hooded sweatshirt and a black, gray, and white glove on the right hand and held a firearm in the same hand. The second man, whose race or ethnicity could not be identified by Vega, wore black and white gloves and carried a knife and a bag. Vega unlocked the registers at gunpoint and the second man transferred the money into the bag. Vega and his coworkers were then ordered to lie on the floor. The perpetrators fled immediately thereafter.[11]

Bakersfield Police Officer Andrew Ferguson arrived on the scene to assist with the investigation. East of Carl's Jr. on northbound Baldwin Road, he found what appeared to be urine in the dirt.

c. *Counts 4 & 5: 7-Eleven at 525 West Columbus Street.*

On November 20, cashier Baljit Bhullar and his coworker Som Nath were behind the service counter when two individuals wearing black ski masks entered the store at

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11 The prosecution played Carl's Jr.'s surveillance footage of the robbery.

10:28 p.m. One wore a gray hooded sweatshirt and a black, gray, and white glove on the right hand and held a firearm in the same hand. That person jumped over the counter first and subdued Bhullar and Nath. The other wore black and white gloves and carried a knife and a bag. That person jumped over the counter second and transferred the money from the register into the bag. The perpetrators departed the store at 10:29 p.m. and went their separate ways.[12]

d. *Count 7: Burger King at 1949 Columbus Street.*

On November 18, four Burger King employees, including manager Angela Brock and cook Ronell Robertson, were on duty when two African-American men entered the restaurant at 8:51 p.m. The taller man wore a ski mask and a black, gray, and white glove on his right hand and held a firearm in his right hand. The shorter man was unarmed, carried a bag, donned a winter hat and black and white gloves, and covered his face with a bandana. The gunman jumped over the service counter and ordered Brock to open the registers. He then asked Robertson whether he knew the safe combination. Robertson responded in the negative. Meanwhile, the unarmed man jumped over the counter and transferred the money from the registers into the bag. The perpetrators fled at 8:52 p.m.[13]

Armando Cantu was waiting for his order at the Burger King drive-through window when he saw the two African-American perpetrators. One of them was grabbing money from the registers. The other, who was armed with the gun, approached the window and ordered Cantu to leave. Cantu complied.[14]

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[12] The prosecution played 7-Eleven's surveillance footage of the robbery.

[13] The prosecution played Burger King's surveillance footage of the robbery.

[14] The prosecution played Burger King's surveillance footage of the drive-through window between 8:49 and 8:52 p.m.

e. *Count 8: El Fogon 2 at 701 East Brundage Lane.*

On the evening of November 16, Bakersfield police officers arrived at El Fogon 2, a Mexican restaurant, in response to a robbery call. They interviewed the cashier and a passerby and conducted an unsuccessful search for possible suspects.

f. *Counts 9 & 10: Fastrip at 6401 South H Street*.

On November 14, cashiers Georgios Bizantioy and Alejandro Diaz were behind the service counter when two armed men entered the store at 9:34 p.m. The first man wore a winter hat and black, gray, and white gloves and covered his face with a bandana. He approached Diaz and demanded money. The second man wore a black ski mask and black gloves. He jumped over the counter, punched Bizantioy in the face, pointed a gun at him, and said, "Give me the money." Diaz unlocked the registers and the perpetrators took the money. The second gunman, i.e., the one who punched Bizantioy, ordered Bizantioy and Diaz to lie on the floor. Bizantioy complied, but Diaz "didn't have [a] spot . . . to get down." As Diaz was "trying to find a spot to lay flat," the second gunman fired a shot through the window. The perpetrators fled the store at 9:36 p.m. and fired two additional shots outside.[15]

Bakersfield Police Officer Ryan Miller arrived on the scene in response to a robbery call. He found three empty Federal .40 caliber shell casings: one inside the store behind the counter and two outside the store near the entrance.

g. *Counts 11 & 12: Fastrip at 4901 South Union Avenue*.

On November 12, loss prevention officer Cedric Weston, cashier Patrice Johnson, and another coworker were on duty when three African-American men entered the store at around 10:00 or 10:30 p.m. The first man wore a winter hat and a black and white glove in his right hand, held a firearm in his right hand, and covered his face with a bandana; the second wore a black hooded sweatshirt and black and white gloves, carried

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15 The prosecution played Fastrip's surveillance footage of the robbery.

a knife, and covered his face with a bandana; and the third wore gloves and covered his face with a bandana but was unarmed. The gunman yelled, "This is a hold up. This is a robbery." All three perpetrators emptied the registers.[16]

II. Arterberry's confession.

On November 25, Bakersfield Police Sergeant Jeffrey Saso interviewed Arterberry after reciting the *Miranda*[17] warning and obtaining Arterberry's consent. Saso testified that Arterberry confessed to the following crimes:

Arterberry participated in the Carl's Jr. robbery on November 24th (counts 1 & 2). Specifically, he collected the money. Arterberry sat in the rear passenger seat of the getaway vehicle alongside a ski mask, gloves, and the bag of money. He conceded his DNA would be found on the gloves. Arterberry "didn't keep the knife" and "denied ever possessing the firearm." When asked whose idea it was of robbing the restaurant, he replied, "It wasn't m[in]e."

Arterberry participated in the Carl's Jr. and 7-Eleven robberies on November 20th (counts 4-6). He wore gloves, carried the knife and the bag, and collected the money. Prior to the Carl's Jr. robbery, Arterberry acknowledged "[s]omeone else" had urinated outside the car. Between the two robberies, "they" drove around. After the 7-Eleven robbery, "everyone g[o]t[] dropped off" and "[e]veryone [went] their separate ways."

Arterberry participated in the Burger King robbery on November 18th (count 7). He viewed a screenshot of Burger King's surveillance footage of the robbery and identified himself as the perpetrator who entered second. He added, "I'm always in the back."

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16 The prosecution presented screenshots of Fastrip's surveillance footage of the robbery.

17 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Arterberry participated in the El Fogon 2 robbery on November 16th (count 8). He did not wear a mask. When asked whether he possessed the knife or the gun, Arterberry responded, "I . . . always got the knife. [¶] . . . [¶] I ain't fuckin' with no gun. Fuck, fuck no. That's bullets. That's . . . major years." When asked who came up with the idea of robbing the restaurant, he answered, "Not mine."

Arterberry participated in the Fastrip robbery on November 12th (counts 11 & 12). His role was to "[g]et the money." Arterberry viewed a screenshot of Fastrip's surveillance footage of the robbery and identified himself as the perpetrator who wore gloves and white Nike high-top sneakers. When asked about the bandana, he replied, "I don't know. I ain't – half that stuff ain't mine, sir."

Arterberry admitted he wore the gloves with "zebra stripes." He donned a ski mask once and a bandana twice. Arterberry was "always in the backseat" and "always at the store." He "had nothing to do with picking the locations." Arterberry stated, "I just go in and [do] what I'm supposed to do with my part."

When asked "how long [he had] been running with the East," Arterberry answered, "For like man before I was a freshman, like seventh, eighth grade, that's when I started kickin' around with those guys." When asked if he had to "back up a friend's actions," he answered, "Pretty much."

III. Gang expert's testimony.

At trial, Bakersfield Police Officer Nathan McCauley, the prosecution's gang expert, detailed the gang affiliation questions posed to Armstrong during the booking process and Armstrong's responses thereto:

> "[T]he questions were asked: 'Do you belong to or associate with a gang in or out of jail?' To which [Armstrong] replied 'Yes.' [¶] 'If yes, which one?' He replied, 'East Side.' [¶] 'Which clique or set?' 'Crips.' [¶] 'Is there any person or group you should be kept away from?' 'Yes.' [¶] 'If yes, who?' 'Bloods.' "

It is unclear whether a *Miranda* warning was given beforehand. Regardless, Armstrong's trial attorney did not object to this testimony.

McCauley testified that the Eastside Crips is a criminal street gang in Bakersfield engaged in, inter alia, robbery and illegal possession of firearms. Members "commit crimes with other members" because "they believe that they can trust [each other] more to follow through with the crime activities." Rivals include the Country Boy Crips, Westside Crips, and Bloods. McCauley opined defendants are Eastside Crips members based on documentation such as booking records, police reports, and field interview cards.

The prosecutor hypothetically asked McCauley whether two to three Eastside Crips members who robbed various restaurants and convenience stores did so for the benefit of, at the direction of, or in association with the gang. McCauley responded, "I believe that it would be at least [for] the benefit of and [in] association [with] the Eastside Crips criminal street gang."

DISCUSSION

I. Arterberry's confession was not subject to the *Aranda-Bruton* rule.

a. *Background.*

On September 5, 2013, citing the *Aranda-Bruton* rule, Armstrong moved to exclude evidence of Arterberry's confession and Jones moved to sever his trial from Arterberry's. The following day, the trial court indicated it reviewed the transcript of Arterberry's November 25, 2012, interview, "red lined out . . . the portions that [it] th[ought] would create Aranda-Bruton issues," and would provide copies of the transcript to and view video footage of the interview with counsel. Subsequently, the court and counsel "spent . . . two hours" "go[ing] through what portions should be redacted from the transcript and from any video/audio that would be played to the jury," resulting in a redacted transcript.

At trial, the prosecutor neither introduced the redacted transcript nor played video footage of Arterberry's interview. Instead, he called Saso to the stand. (See *ante*, at pp. 9-10.) Before the prosecutor could elicit Saso's testimony about Arterberry's confession, the court instructed the jury:

> "[Y]ou have heard a little bit about some statements attributed to Mr. Arterberry in an interview that the Sergeant had with Mr. Arterberry. You may hear some more about that. [¶] That evidence is only admissible and only to be considered by you in regard to any charges or allegations as to Mr. Arterberry. It is not to be considered for any purpose as to Mr. Armstrong or Mr. Jones."

Arterberry did not testify.

Prior to closing arguments, the court issued CALCRIM No. 305 (Multiple Defendants: Limited Admissibility of Defendant's Statement):

> "You have heard evidence that [d]efendant Cameron Arterberry made statements or a statement out of court before trial. You may consider that evidence only against him, not against any other defendant."

b. *Analysis.*

"A criminal defendant has a right, guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution, to confront adverse witnesses. The right to confrontation includes the right to cross-examination." (*People v. Lewis* (2008) 43 Cal.4th 415, 453 (*Lewis*), overruled in part by *People v. Black* (2014) 58 Cal.4th 912, 919-920.) "A problem arises when a codefendant's confession implicating the defendant is introduced into evidence at their joint trial. If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession." (*Lewis*, *supra*, at p. 453.)

"*Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 652; accord, *Bruton*, *supra*, 391 U.S. at pp. 126-137; see *Aranda*, *supra*, 63 Cal.2d at pp. 528-531.)[18] The *Aranda-Bruton* rule sets forth a "narrow exception" to "the almost invariable assumption of the law that jurors follow their instructions." (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-207 (*Richardson*).) "[A]lthough juries ordinarily can and will follow a judge's instructions to disregard inadmissible evidence, 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.' [Citation.] Such a context is presented when 'the powerfully incriminating extrajudicial

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18 *Aranda*, which preceded *Bruton*, implemented a stricter rule based on the California Supreme Court's supervisory power over state rules of evidence rather than the Sixth Amendment's confrontation clause. (See *Aranda*, *supra*, 63 Cal.2d at pp. 529-530.) The enactment of Proposition 8's "Truth-in-Evidence" provision (Cal. Const., art. I, § 28, subd. (f)(2)) made *Aranda* coextensive with *Bruton*. (See *People v. Fletcher* (1996) 13 Cal.4th 451, 465 (*Fletcher*).)

statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.' [Citation.]" (*Lewis, supra,* 43 Cal.4th at p. 453, quoting *Bruton, supra,* at pp. 135-136.)

"Whether instructing the jury to disregard a nontestifying codefendant's confession in determining a defendant's guilt adequately protects the defendant's Sixth Amendment right of confrontation depends upon whether the jurors can reasonably be expected to obey the instruction. [Citations.] In turn, the jurors' ability to obey the instructions depends upon how directly and how forcefully the codefendant's confession incriminates the nondeclarant defendant. [Citation.]" (*Fletcher, supra,* 13 Cal.4th at p. 465.) Under this standard, the *Aranda-Bruton* rule clearly bars facially incriminating confessions, i.e., those that expressly name the nondeclarant defendant. (*Richardson, supra*, 481 U.S. at p. 208.) However, "the calculus changes when confessions that do not name the defendant are at issue." (*Id.* at p. 211.) Where a confession is not facially incriminating and becomes inculpatory only when it is linked to other evidence, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. . . . [W]ith regard to . . . an explicit statement[,] the only issue is . . . whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination[,] the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so . . . ." (*Id.* at p. 208.)[19]

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19 The high court also highlighted the impractical effects of extending the *Aranda-Bruton* rule to confessions requiring linkage, namely (1) rendering pretrial redaction, which enables compliance with the rule, futile; and (2) increasing the need for separate trials, which in turn would impair the efficiency and fairness of the criminal justice system. (*Richardson, supra,* 481 U.S. at pp. 208-210.)

A nontestifying codefendant's redacted confession may fall outside the ambit of the *Aranda-Bruton* rule. "[W]hether th[e] . . . editing . . . sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a 'bright line' rule of either universal admission or universal exclusion." (*Fletcher*, *supra*, 13 Cal.4th at p. 456.) Rather, the efficacy "must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." (*Id.* at p. 468.)

A redacted confession is admissible where the editing "eliminate[s] not only the defendant's name, but any reference to his or her existence." (*Richardson*, *supra*, 481 U.S. at p. 211, fn. omitted; see, e.g., *id.* at p. 203 & fn. 1; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1047; *People v. Hampton* (1999) 73 Cal.App.4th 710, 712, 720-721.) "Moreover, even in those instances in which it is not feasible to eliminate all of the confession's references to the nondeclarant's existence, redaction will continue to be a viable solution in a substantial number of cases." (*Fletcher*, *supra*, 13 Cal.4th at p. 467.) While "editing a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights" (*id.* at p. 468), such redaction "will adequately safeguard the nondeclarant's confrontation rights unless the average juror . . . could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the nondeclarant's guilt" (*id.* at p. 467). "For example, a confession that is redacted to substitute pronouns or similar neutral and nonidentifying terms for the name of a [nondeclarant] []defendant will be sufficient if the []defendant was just one of a large group of individuals any one of whom could equally well have been the coparticipant mentioned in the confession." (*Id.* at p. 466.)

On the other hand, the *Aranda-Bruton* rule applies to statements that, "despite redaction, obviously refer directly to . . . the defendant . . . and . . . involve inferences that

a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (*Gray v. Maryland* (1998) 523 U.S. 185, 196.) "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that . . . closely resemble . . . unredacted statements . . . ." (*Id.* at p. 192; accord, *People v. Bryden* (1998) 63 Cal.App.4th 159, 176.) In addition, "[a] confession redacted with neutral pronouns may still prove impossible to 'thrust out of mind' [citation] if, for example, it contains references to distinctive clothing, mannerisms, place of residence, or other information that readily and unmistakably identifies the person referred to as the nondeclarant defendant." (*Fletcher, supra,* 13 Cal.4th at pp. 465-466.)

Here, the prosecution did not present the redacted transcript or video footage of Arterberry's interview. Rather, evidence of Arterberry's confession was derived from Saso's testimony. According to Saso, Arterberry admitted he participated in the robberies charged on counts 1, 2, 4 through 8, 11, and 12 as the perpetrator who "always got the knife" and "[go]t the money." He specified he "had nothing to do with picking the locations" to be robbed, was "always in the back," was "always in the backseat," "didn't keep the knife," never possessed a firearm, and occasionally donned apparel that did not belong to him. Relating to counts 4 through 6, Arterberry acknowledged "[s]omeone else" had urinated outside the car before the Carl's Jr. robbery, "they" drove around before the 7-Eleven robbery, and "everyone g[o]t[] dropped off" and "[e]veryone [went] their separate ways" after the 7-Eleven robbery. He added he has associated with the Eastside Crips since middle school. At no point did Saso attest to Arterberry explicitly naming Armstrong and Jones as coparticipants in the robberies. Though an average juror could reasonably deduce from Arterberry's statements that Arterberry did not act alone, the statements on their face did not "forcefully . . . incriminate[]" (*Fletcher, supra*, 13 Cal.4th at p. 465), "obviously refer directly to" (*Gray v. Maryland, supra,* 523 U.S. at p. 196), or otherwise encompass "information that readily and unmistakably

identif[y]" (*Fletcher*, *supra*, at p. 466) Armstrong or Jones. Arterberry's confession became inculpatory only when it was linked with other evidence in this case, e.g., the surveillance footage. "Where the necessity of such linkage is involved" (*Richardson, supra*, 481 U.S. at p. 208), the *Aranda-Bruton* rule is inapplicable. (See *ante*, at p. 14 & fn. 19.)

II. Substantial evidence supported the robbery convictions on counts 4 through 12.

"To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible[,] and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]' [Citation.]" (*Tripp, supra*, at p. 955, italics omitted.)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

"This standard of review . . . applies to circumstantial evidence. [Citation.] If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*Tripp*, *supra*, 151 Cal.App.4th at p. 955.)

In the instant case, defendants do not contest their convictions of the November 24, 2012, Carl's Jr. robberies (counts 1 and 2). As previously stated, Arterberry admitted to his involvement in the robberies charged on counts 4 through 8, 11, and 12. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 97, fn. 1 [testimony recounting defendants' confession constitutes substantial evidence supporting a robbery conviction]; *People v. Vuyacich* (1922) 57 Cal.App. 233, 236 ["[A]fter proof of the corpus delicti the confession of a defendant is sufficient to warrant a conviction." italics omitted].)

The record demonstrates at least two perpetrators were involved in each of robberies charged on counts 4 through 7, and 9 through 12. Armstrong claims the evidence did not support his convictions on these counts because he could not be identified as one of the perpetrators.

"The sufficiency of the evidence of identification is generally a question for the trier of the facts." (*People v. Wiest* (1962) 205 Cal.App.2d 43, 45.) "In order to sustain a conviction the identification of the defendant need not be positive." (*Ibid.*) "The identification of the perpetrator of an offense may be established entirely by [circumstantial] evidence." (*People v. Barnum* (1957) 147 Cal.App.2d 803, 805.) For instance, identity may be inferred from the factual similarities of the charged offenses. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 857-858; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1224; *People v. Miller* (1990) 50 Cal.3d 954, 988-989; *People v. Haston* (1968) 69 Cal.2d 233, 247-250 (*Haston*).) "To be admissible as modus operandi evidence there must be common marks which, considered singly or in combination, support the strong inference that defendant committed [the] crimes." (*People v. Bean*

(1988) 46 Cal.3d 919, 937.) "The inference of identity . . . need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*People v. Miller*, *supra*, at p. 987.) At the same time, the features "must be distinctive rather than ordinary aspects of any such category of crime." (*People v. Bean*, *supra*, at p. 937; see *People v. Matson* (1974) 13 Cal.3d 35, 41; *People v. Shells* (1971) 4 Cal.3d 626, 631-632 [similarity requirement that applies to the admission of evidence of uncharged offenses are not applicable when all offenses are charged].)

There were a number of similarities between the Carl's Jr. robbery on November 24th (counts 1 & 2) and the Fastrip robbery on November 14th (counts 9 & 10). Each incident took place in Bakersfield at night and involved two masked and gloved perpetrators, at least one perpetrator who was armed with a gun, the subjugation of the workers on duty, and the theft of money from the registers. We do not believe these common features alone are "of th[e] distinctive nature necessary to raise a logical inference that the perpetrators of the [November 24th robbery] were the perpetrators of the [November 12th, 18th, and 20th robberies]" because "[i]t is common knowledge that each . . . of the[se] indicated marks are shared . . . by . . . many armed robberies." (*Haston*, *supra*, 69 Cal.2d at p. 248.) Nonetheless, we believe Armstrong's identity may be inferred from a single "significantly distinctive mark." (*Id.* at p. 250.) The record, viewed in the light most favorable to the prosecution, shows Armstrong wielded a .40 caliber semiautomatic firearm loaded with Federal ammunition during the November 24th robbery. Armstrong does not dispute this fact. Ten days earlier, at the scene of the November 14th robbery, Miller recovered three empty Federal .40 caliber shell casings. "[T]he circumstance that the same type of ammunition used [during the November 14th robbery] was found in [Armstrong's gun after the November 24th robbery]" (*People v. Vines*, *supra*, 51 Cal.4th at p. 858) "sufficed to demonstrate [Armstrong]'s identity as [a] perpetrator" (*id.* at p. 857).

There were also a number of similarities between the Carl's Jr. robbery on November 24th (counts 1 & 2) and the Fastrip, Burger King, Carl's Jr., and 7-Eleven robberies that transpired on November 12th, 18th, and 20th (counts 4-7, 11, & 12). Each incident took place in Bakersfield at night and involved at least two masked and gloved perpetrators, one perpetrator who was armed with a gun, a separate perpetrator who carried a knife and/or bag, the subjugation of the workers on duty, and the theft of money from the registers. Again, these common features alone were not sufficiently distinctive to raise the inference that Armstrong participated in the November 12th, 18th, and 20th robberies. (See *Haston*, *supra*, 69 Cal.2d at p. 248.) Again, however, we believe Armstrong's identity may be inferred from a single significantly distinctive mark: Arterberry's participation in each of these robberies.

The record, viewed in the light most favorable to the prosecution, shows two masked and gloved men dressed in dark-colored clothing robbed Carl's Jr. on November 24th. One carried the firearm and the other carried the knife and bag. These perpetrators left the restaurant and entered the passenger side of a 1988 Lincoln Town Car whose engine was running, indicating someone was already waiting in the driver's seat. Thereafter, Woolard pulled over the vehicle: Jones, the driver, was wearing light-colored clothing while Armstrong and Arterberry, the passengers, were wearing dark-colored clothing. An automobile search revealed black ski masks, two pairs of black and white gloves, a bag containing a large sum of money, a knife, and a .40 caliber semiautomatic firearm. Four witnesses identified Armstrong as the gunman. The jury could logically infer Arterberry was the perpetrator with the knife and bag since he was the only other passenger in the car wearing dark-colored clothing.

At the November 20th Carl's Jr. and 7-Eleven robberies (counts 4-6), one of the perpetrators wore black and white gloves and carried the knife and bag. At the November 18th Burger King robbery (count 7), one of the perpetrators wore black and white gloves and carried the bag. At the November 12th Fastrip robbery (counts 11 &

12), one of the perpetrators wore black and white gloves and carried the knife. The gloves, knife, and bag matched those on the person of the non-gunman perpetrator and found in the getaway vehicle on November 24th. Since the jury could logically infer Arterberry was the non-gunman perpetrator on November 24th, it could also logically infer Arterberry participated in the November 12th, 18th, and 20th robberies.

"It is clear that [Arterberry's] presence, unlike the other [aforementioned] features . . . , is a mark whose distinctive nature tends to differentiate [the charged robberies] from other armed robberies. There is only one [Arterberry], and his conjunction with [Armstrong] in [the November 24th robbery], together with his . . . participation in the [November 12th, 18th, and 20th] robberies . . . , supports the inference that [Armstrong] and not some other person was his accomplice in [the November 12th, 18th, and 20th robberies]." (*Haston*, *supra*, 69 Cal.2d at p. 249.)

Hence, we conclude substantial evidence supported the robbery convictions on counts 4 through 12.

III. Armstrong's claim of ineffective assistance of counsel must be rejected because the appellate record does not shed light on why his trial attorney acted or failed to act in the challenged manner.

To establish ineffective assistance of counsel, a defendant must show (1) defense counsel did not provide reasonably effective assistance in view of prevailing professional norms; and (2) defense counsel's deficient performance was prejudicial. (See *People v. Oden* (1987) 193 Cal.App.3d 1675, 1681, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "It is . . . particularly difficult to establish ineffective assistance of counsel on direct appeal, where we are limited to evaluating the appellate record. If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record before us " 'does not illuminate the basis for the attorney's challenged acts or omissions . . . .' " (*People v. Silvey* (1997) 58 Cal.App.4th 1320, 1329.) Armstrong's trial attorney was never asked to explain why he failed to object to McCauley's testimony regarding Armstrong's responses to gang affiliation questions posed during the booking process. Furthermore, " ' "[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel" [citation].' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 609-610; see *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [" ' "[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' "]; *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [" 'Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' "].)[20] Accordingly, we reject Armstrong's claim of ineffective assistance of counsel.

IV. The restitution fines shall be reduced from $280 to $240.[21]

Section 1202.4, subdivision (b)(1), provides, in part:

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[20] We note the California Supreme Court recently held that gang affiliation questions posed to a defendant during booking are reasonably likely to elicit incriminating responses; therefore, absent a *Miranda* warning, the defendant's answers to those questions are inadmissible. (See *People v. Elizalde* (2015) 61 Cal.4th 523.) *Elizalde* disapproved, in part, *People v. Gomez* (2011) 192 Cal.App.4th 609, 630-631, in which the Fourth Appellate District held that non-Mirandized responses to gang affiliation questions are admissible if, in view of the surrounding facts and circumstances, such questions are legitimate booking questions and not a pretext for eliciting incriminating remarks. (*People v. Elizalde, supra,* at p. 538, fn. 9.) *Gomez* was good law at the time of trial in the instant case. In addition, prior to *Elizalde*, the California Supreme Court had cited *Gomez* with approval. (See *People v. Williams* (2013) 56 Cal.4th 165, 187-188.)

[21] Although Armstrong did not join in Jones's argument (see *ante,* fn. 5), certain sentencing errors such as imposition of the incorrect fine "are so obvious and so easily fixable that correction . . . will not unduly burden the courts or the parties." (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

> "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine . . . . [¶] . . . The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000)."

At the November 12, 2013, sentencing hearing, the trial court imposed a restitution fine of $280 on defendants. Defendants argue their respective restitution fines should have been set at $240. The Attorney General agrees. We accept the concession.

V. The trial court did not abuse its discretion when it denied motions to disclose the identity of the confidential informant.

a. *Background.*

Cantu, the prosecution witness who testified with regard to the Burger King robbery on November 18th (see *ante*, at p. 7), claimed he saw the same two perpetrators exiting a Walgreens the following evening. He spoke to a Walgreens clerk, who indicated the pharmacy had been robbed, and called the police.

Saso testified that he and Sergeant Brent Stratton reviewed Walgreens's surveillance footage of the robbery. Stratton recognized the individuals, none of whom was Armstrong, Arterberry, or Jones. Also, an "anonymous source" confirmed "the two individuals in the video were not related to the robberies" at issue. Later, Saso informed the prosecutor he "received information from [Bakersfield Police Officer] Ch[arles] Sherman . . . that . . . Sherman received[] through a confidential informant . . . ."

Armstrong and Jones filed motions to disclose the identity of the confidential informant and Arterberry joined in these motions. The trial court held an in camera hearing in the presence of the prosecutor and Sherman. Thereafter, the court held a hearing in open court and summarized its findings of the in camera hearing:

> "Based on the sworn testimony of Charles Sherman, the only individual who had contact with the confidential informant pertaining to the

two individuals at Walgreens, . . . Sherman indicated that the only contact he had with the confidential informant in regard to this case at all were two things:

"First, he showed photographs from the surveillance video from Walgreens of the two individuals that were at Walgreens, and the confidential informant said that those individuals appeared to be the individuals that Charles Sherman already knew their names. That was the only thing that the confidential informant provided.

"So, in essence, two photographs were shown to the confidential informant.

"The confidential informant was asked, 'Do you know who these people are?' He said, 'They look like,' quote unquote, the two individuals.

"Then three photographs were shown to the confidential informant in regard to the three defendants in this case. The confidential informant did not recognize any of those three individuals.

"The confidential informant was not asked any questions nor volunteered any information as to who committed any robberies, whether or not the confidential informant knew who was involved in any robberies, who didn't commit any robberies. There was no information provided by the confidential informant that the two individuals at Walgreens did not commit any robberies or did commit any robberies. It was simply limited to identifying the two individuals, of which Officer Sherman said he already knew the identity, and he was utilizing the confidential informant to find out if that individual knew anything, of which the individual did not. And he was not asked any questions about it.

"Officer Sherman did testify that at some point he thought about following up with the confidential informant, but Sergeant Saso . . . had somehow eliminated those two individuals. And so, therefore, there was no further follow-up with the confidential informant with regard to the robberies."

The court denied the motions, finding "no information that would deprive any of the defendants of a fair trial," "[no] inculpatory or exculpatory information provided by the confidential informant," and "no information that this confidential informant could give evidence on the issue of guilt that might result in exoneration."

On appeal, defendants ask us to review the sealed transcript of the trial court's in camera hearing. The Attorney General does not object.

b. *Analysis*.

"As a general rule, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information purporting to expose a violation of a law and to prevent another from disclosing such identity if disclosure is against the public interest because there is a necessity for preserving the confidentiality of the informant's identity that outweighs the necessity for disclosure in the interest of justice." (*People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488, citing Evid. Code, § 1041, subd. (a).) However, "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*Ibid.*)

"We review the trial court's ruling concerning the disclosure of the identity of a confidential informant under the abuse of discretion standard." (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

We have reviewed the sealed transcript of the in camera hearing and find that the record "demonstrates, based on a sufficiently searching inquiry, that the informant could not have provided any evidence that, to a reasonable possibility, might have exonerated defendant[s]." (*People v. Lawley*, *supra*, 27 Cal.4th at p. 160.) Thus, we conclude the trial court did not abuse its discretion when it denied the disclosure motions.

DISPOSITION

The judgments are modified to reduce to $240 the restitution fines imposed on defendants pursuant to Penal Code section 1202.4, subdivision (b)(1). As so modified, the judgments are affirmed. The trial court is directed to amend the abstracts of judgment to reflect said modifications and to transmit certified copies thereof to the appropriate authorities.

_____
DETJEN, Acting P.J.

WE CONCUR:

_____
PEÑA, J.

_____
SMITH, J.